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Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 282.

THE MINNEAPOLIS & ST. LOUIS RAIL WAY COMPANY, *Plaintiff in Error*,

AGAINST

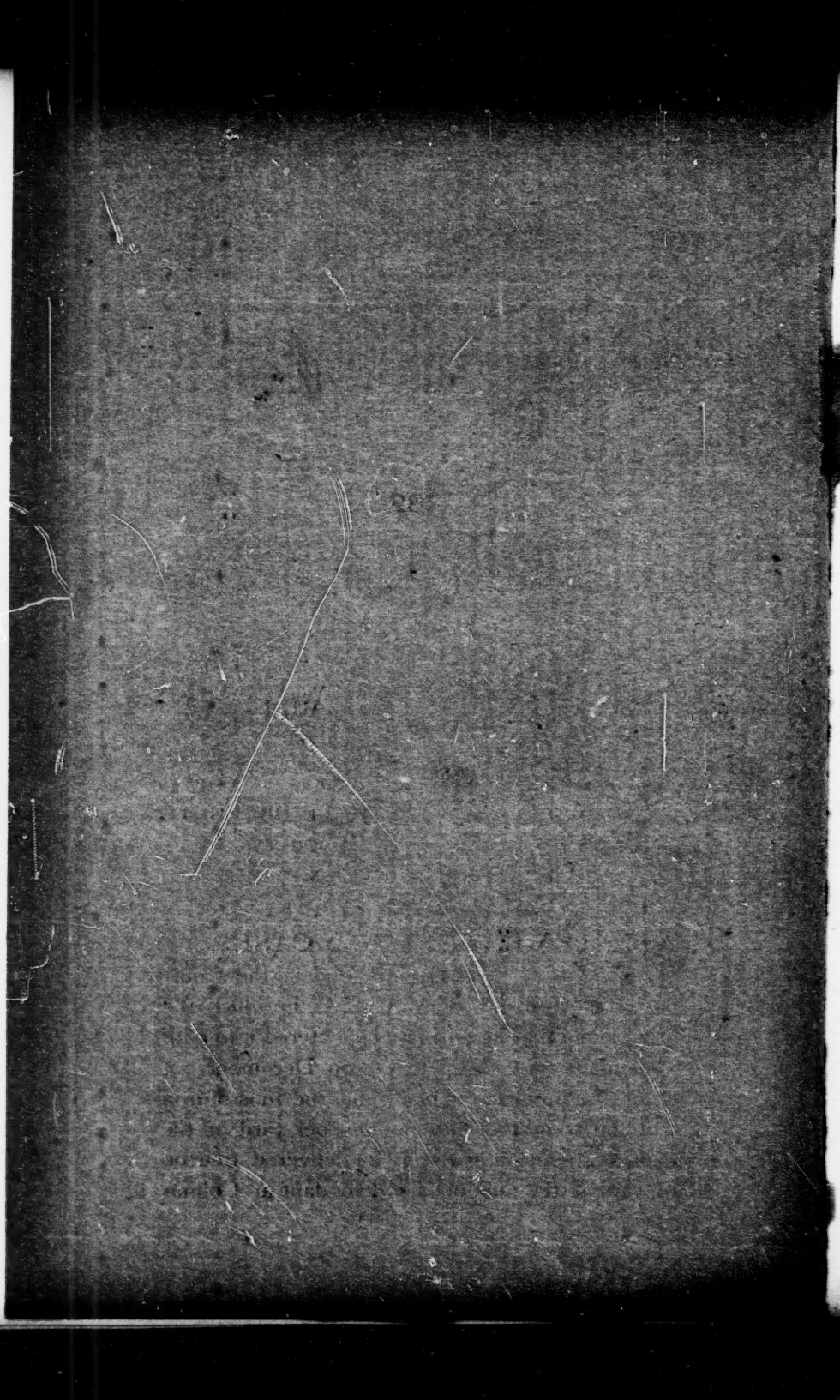
THE COLUMBUS ROLLING MILL COM PANY, *Defendant in Error.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

BRIEF FOR PLAINTIFF IN ERROR.

C. N. OLDS AND
L. J. CRITCHFIELD,
Attorneys for Plaintiff in Error.

GAZETTE PRINTING HOUSE, COLUMBUS, OHIO.



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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

STATEMENT OF THE CASE.

The petition in this case was filed in the Court below on the 8th day of May, 1880, in which the plaintiff claims that a contract was entered into with the defendant, at Columbus, O., on December 19, 1879, for the purchase of two thousand tons of iron rails of the weight of fifty pounds per yard at the price of $54 per ton gross, to be delivered free on board cars at the mill of said defendant at Colum-

burs, O., in the month of March, 1880; to be paid for by said plaintiff in cash when so delivered.

The petition charges a breach of said contract on the part of the defendant and claims damages in the sum of $32,000. (See printed Record, pp. 1 and 2).

On the 8th day of June, 1880, the defendant filed its answer, admitting that it did not deliver the two thousand tons of iron rails, or any other quantity, but denying each and every other allegation of said petition in relation to said contract. (See printed Record, p. 3).

On the 22d day of December, 1880, the plaintiff, on leave, filed an amendment to its petition, in which, after averring the non-delivery of the said iron rails under said contract in the month of March, 1880, it averred further that on the 10th day of January, 1880, the defendant notified the plaintiff that it repudiated the said contract and refused to execute and perform the same, or to be bound thereby, and did, in fact, thenceforth wholly neglect and refuse to recognize or to execute and perform the same; whereupon the plaintiff notified the defendant that it would go into the open market and purchase the said iron rails on the best terms obtainable, and hold said defendant responsible for all damages resulting therefrom; the purchase of said rails being necessary for the use and purposes of said plaintiff in the construction of its railroad, then in process of construction, and for which uses and purposes the said contract with the defendant was made, as was

well known to said defendant when said contract was made and when it was repudiated as aforesaid. It averred further that by reason of the refusal of the defendant to recognize and to execute said contract, the plaintiff was compelled to, and did on the 26th of January, 1880, purchase for the uses and purposes aforesaid one thousand tons of such iron rails at and for the price of $70 per ton gross, that being the fair market price and the best terms obtainable in the market at the time; and it averred further that during the month of March, 1880, at Columbus, Ohio, the said iron rails were fairly worth and of the market value of $70 per ton gross. Wherefore the plaintiff had sustained damages in the sum of $32,000, for which it prayed judgment. (See printed Record, p. 4).

On the 29th day of March, 1881, the defendant filed its motion to strike said amendment to the petition from the files, on the ground that the said facts set forth therein were immaterial and irrelevant, and said amendment was not such as ought to be allowed; which motion was afterwards to wit on the 8th day of June, 1881, sustained by the Court, and the said amendment was stricken from the files, to which the plaintiff excepted. (See printed Record, pp. 5 and 6).

The first assignment of error is that the Court erred in sustaining said motion, and in ordering the said amendment to the petition to be stricken from

the files. (See printed Record, p. 102. This point is considered on p. 19 of this brief.)

On the 6th day of December, 1881, the case came on for trial before a jury upon the issue joined on the original petition and answer, and on the 10th day of December, 1881, said trial resulted in a verdict for the defendant. (See printed Record, p. 6).

On the 13th day of December, 1881, a motion was filed by the plaintiff to set aside this verdict and for a new trial, which motion was afterwards, to wit on the 15th day of December, 1881, overruled by the Court and a judgment entered upon the verdict in favor of the defendant, to which the plaintiff excepted, and tendered its bill of exceptions which was allowed, signed and sealed and made part of the Record in this case. (See printed Record, pp. 7 and 8.)

The facts in this case, as shown by the testimony, are substantially as follows:

On the 5th of December, 1879, Chas. F. Hatch, the General Manager of the Minneapolis & St. Louis Railway Company, the plaintiff, sent from Minneapolis, Minn., to the Columbus Rolling Mill Company of Columbus, O., the defendant, a letter of which the following is a copy:

"DEC. 5TH, 1879.

Rolling Mill Company, Columbus, Ohio.

GENTS.—Please quote us prices for 500 to 3,000 tons, 50 lb. steel rails, and for 2,000 to 5000 tons 50 lb. iron rails, March, 1880, delivery.

Yours truly, CHAS. F. HATCH, G. M."

(See printed Record pp. 9 and 45.)

On the 8th of December 1879, the Columbus Rolling Mill Company, the defendent, by W. A. Harrison, Sec'y, sent a letter in reply, as follows:

"COLUMBUS, O., DEC. 8TH, 1879.

Chas. F. Hatch, Esq., General Manager M. & St. L. Railway, Minneapolis, Minnesota.

DR. SIR.—Your favor of 5th inst., at hand. We do not make steel rails.

For iron rails we will sell 2,000 to 5,000 tons 50 lb. rails for fifty-four (54.00) per gross ton for spot cash F. O. B. cars at our mill, March delivery, subject as follows: In case of strike among our workmen, destruction of or serious damage to our works by fire or the elements, or any causes of delay beyond our control, we shall not be held accountable for damages. If our offer is accepted shall expect to be notified of same prior to December 20th, 1879.

Yours truly &c.,

W. A. HARRISON, *Secretary.*"

(See printed Record pp. 9 and 45–6.)

On the 16th of December, 1879, the said Chas. F. Hatch as General Manager for plaintiff, sent to the defendant, the following telegram:

"DEC. 16TH.

W. A. Harrison, Secretary Columbus Rolling Mill Company, Columbus, Ohio.

Please enter our order for twelve hundred (1,200 tons rails, March delivery, as per your favor of the 8th (eighth). Please reply.

CHAS. F. HATCH,

Generat Manager, M. & St. L. Railway."

On the same day he also sent the following letter:

" DEC. 16TH, 1879.

W. A. Harrison, Esq., Secretary Rolling Mill Company, Columbus, Ohio.

DR. SIR.—Yours of the 8th inst. came duly to hand. I telegraphed you to-day to enter an order for twelve hundred (1,200) tons 50 lb iron rails for next March delivery at fifty-four (54) dollars F. O. B. cars at your mill. Please send contract. Also please send me templets of your 50 lb rail. Do you make splices? If so, give me prices for splices for this lot of iron.

Yours truly,

CHAS. F. HATCH, G. M."

(See printed Record pp. 9 and 10, and 46.)

On the 18th of December 1879, the Defendant sent the following telegram in reply:

"COLUMBUS, DEC. 18TH.

C. F. Hatch.

We can not book your order at present at that price.

COLUMBUS ROLLING MILL COMPANY."

On the receipt of this telegram, on the 19th of December, 1879, the plaintiff sent the following telegram:

" DEC. 19TH, 1879.

Columbus Rolling Mill, Columbus, Ohio.

Your proposition holds good until December 20th (twentieth). Do you decline to carry it out?

C. F. HATCH."

And on the same day, it sent the following:

"DEC. 19TH, 1879.

Columbus, Roll Mill Company, Columbus, O.

Please enter our order for two thousand tons rails as per your letter of the 6th. Please forward written contract. Reply.

C. F. HATCH."

(See printed Record pp. 10 & 47.)

NOTE.—(It is admitted by counsel for defendant and for plaintiff that the date of the letter referred to was the *8th* of December and not the 6th, and is called the 6th by mistake.)

(See printed Record pp. 11 and 93.)

No reply being received to the last two messages, on December 22, '79, the plaintiff sent the following:

"Did you enter my order for two thousand (2,000) tons rail as per my telegram of Dec. 19th? Ans." And on the 26th of December '79, the following: "I am still without reply to my telegrams of December 19th and 22d. Please let me hear from you," And on the 30th of December, '79, the following: "Why do I not get a reply to my telegrams and letters regarding order for two thousand tons rails sent you December 19th?"

(See printed Record pp. 10 and 48–9.]

On the 30th of Dec. '79, the defendant sent the plaintiff the following telegram:

"*Chas. F. Hatch, Minneapolis.*

Wrote you yesterday. Will write you Friday fully,

W. A. HARRISON."

This letter referred to above was as follows:

"COLUMBUS, O., DEC. 29th, 1879.

Chas. F. Hatch Esq., General Manager.

DR. SIR.—Your several letters and telegrams duly to hand. Will reply in full to them the latter part of this week. Am too fully pressed on other matters just at present to give them attention.

Yours truly &c.,

W. A. HARRISON, *Secretary.*"

(See printed Record pp. 10 and 49–50.)

This last letter was received by the plaintiff about January 1, 1880, but no other letter was ever sent or received from the defendant.

After sending two other telegrams calling for such letter or some further response, the plaintiff about the middle of January 1880, sent a special agent to the defendant, to demand a recognition of the contract; between whom and the defendant, the following correspondence took place at Columbus, Ohio, on the 19th of January, 1880.

"*To the Columbus Rolling Mill Company.*

GENTLEMEN.—The Minneapolis & St. Louis Railway claim a contract with you for two thousand (2,000), gross tons 50 lb. iron rails F. O. B. cars at your mill, March 1880 delivery; terms spot cash $54.00 per gross ton. Demand having been made for recognition of contract and refused, you are hereby notified that the M. & St. L. Railway Company, will go into the open market and purchase such amount of rails for your account, on the best terms obtainable, holding you responsible for all damages actual or contingent resulting from your refusal.

Yours truly,

THE MINNEAPOLIS & ST. LOUIS RAILWAY,

BY T. B. WOOLSEY, *Agent.*"

"COLUMBUS, O., JAN. 19TH, 1880.
The Minneapolis & St. Louis Railway Company.
BY T. B. WOOLSEY, *Agent.*

DEAR SIR.—Your notice of 19th received. We deny your power or authority under any papers that have passed between your company and the Columbus Rolling Mill Company to make any purchase on our account, and with this notice in response to yours of 19th inst., as a notification of the same power as that of yours which you have placed in our hands.

Yours truly,
COLUMBUS ROLLING MILL COMPANY,
SAMUEL THOMAS, *Treasurer.*"

(See printed Record pp. 12 and 51.)

The foregoing correspondence constitutes the evidence offered relating to the contract between the parties, except that the defendant, on cross-examintion of C. F. Hatch offered the following telegram from W. D. Washburn, President of the plaintiff Company to said Hatch, which was received in evidence, subject to the objection of the plaintiff as irrelevant and incompetent.

"WASHINGTON, DEC. 16TH.

C. F. Hatch.

I think you had better accept Columbus offer for ten or twelve hundred ton.

W. D. W."

(See printed record p. 18.)

The plaintiff also offered evidence to show the damages sustained by it from the refusal of Defendant to recognize and execute the said contract.

The verdict being for the defendant the plaintiff, moved for a new trial. The motion was overruled and plaintiff excepted, and filed the present petition in error.

Of the errors assigned we consider the following, arising on overruling the plaintiff's motion for a new trial, to-wit:

1. The verdict is contrary to the law of the case, upon its facts.

2. The Circuit Court erred in its charge to the jury, and in refusing to charge as requested by the plaintiff.

3. The Circuit Court erred in sustaining the defendant's motion to strike the amendment to the petition from the files, and in ordering the same to be done.

ARGUMENT.

The assignments of error are connected with the following inquiries, and are conveniently considered in that connection:

1. Was the offer of December 8th, by the defendant, to sell to the plaintiff 2,000 to 5,000 tons iron rails at $54 per gross ton, March delivery, to be accepted prior to December 20th, accepted so as to make a contract between the parties?

2. If so, did the refusal of the defendant, on January 19th, to be bound by the contract, entitle the plaintiff to damages measured by the market price of such rails at that date?

In connection with the first inquiry we will consider the assignments of error relating to the validity of the verdict upon the evidence and the law, and relating to the charge of the Court, and the refusal to charge as requested.

In connection with the second inquiry we will consider the alleged error of the Court below in striking the amendment to the petition from the files.

I.

1. Was the offer of December 8th accepted so as to make a contract?

The offer of the 8th was never withdrawn. The only limitation contained in the offer is that it should be accepted prior to Dec. 20th.

The offer was accepted within the time limited. The acceptance was by the plaintiff's telegram of December 19th: "Please enter our order for two thousand tons rails as per your letter of the 6th. Please forward written contract. Reply." [It is agreed that the letter referred to was the one sent and dated the 8th, called the 6th by mistake.]

That acceptance of the offer was sufficient to make the contract, if on the 19th the offer was open for acceptance.

The defendant claims that the offer of the 8th was rejected on the 16th by the plaintiff's telegram and and letter of that date, ordering 1,200 tons of rails, and therefore was not open for acceptance on the 19th.

The plaintiff's telegram of the 16th is: "Please enter our order for 1,200 tons rails, March delivery, as per your favor of the 8th. Please reply."

The plaintiff's letter of the 16th is: "Yours of the 8th inst. came duly to hand. I telegraphed you to-day to enter an order for twelve hundred tons 50 lbs. iron rails for next March delivery, at fifty-four dollars, F. O. B. at your mill. Please send contract."

In aid of the defendant's claim that its offer of the 8th was rejected by the telegram and letter of the 16th, the defendant refers to the telegram of the same date, sent by Washburn, President of the plaintiff, to Hatch, its General Manager. That telegram is: "I think you had better accept Columbus offer for ten or twelve hundred tons."

We recognize the rule of law adopted by the Court below, that "a proposal to accept, or acceptance upon terms varying from those offered, is a rejection of the offer."

I. Do the plaintiff's telegram and letter of the 16th, to the defendant, in connection with Washburn's telegram of the 16th to Hatch, show a rejection of the defendant's offer of the 8th, under that rule?

It is a mixed question of construction and law.

1. We submit that the plaintiff's telegram and letter of the 16th constitute an *independent order* for 1,200 tons of iron rails, and are not in reply to the offer of the 8th, but refer to that offer for no other purpose than to identify the kind and price of rails and time of delivery, leaving the question of accepting or rejecting the offer of the 8th open, and to be acted upon prior to the 20th.

The telegram and letter do not, in direct words, express any proposal to accept, or any acceptance of the offer.

It was competent for the plaintiff to hold the offer of the 8th under advisement until the 20th, according to its terms, and in the meantime order any quantity of rails the plaintiff might need, referring to that offer for kind, price, and time of delivery. That would constitute a *reference* to the offer *for those purposes*, but *not a reply* to it.

That the defendant understood the plaintiff's telegram and letter of the 16th to be an independent order, and not a reply to the offer of the 8th, is shown by the defendant's telegram of the 18th, in answer to the plaintiff's telegram and letter of the 16th: "We cannot *book* your *order at present at that price.*"

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That is precisely such an answer as might have been expected to an order of the plaintiff in this form: "We will hold our acceptance or rejection of your offer of the 8th under advisement until the 20th, according to its terms, but now wish you to book this independent order for 1,200 tons rails of the kind and at the price named in your favor of the 8th."

As the telegram of Washburn to Hatch was between them exclusively, and not between the plaintiff and defendant, it is material only in so far as it may help to interpret the plaintiff's telegram and letter (through Hatch) of the 16th, to the defendant. Washburn was at Washington City. Hatch was in Minnesota. While Washburn's telegram uses the word "accept," in connection with the "Columbus offer, for ten or twelve hundred tons," Hatch, in sending the plaintiff's telegram and letter of the 16th to the defendant, does not use the word "accept," but does use the words, "enter our order for twelve hundred tons"—just such form of words as would be used in giving an independent order for 1,200 tons, and not a reply to the offer of the 8th, holding the question of accepting or rejecting that offer under advisement.

It may be fairly concluded that Hatch purposely departed from Washburn's suggestion, after consultation with others interested, in Minnesota. At any rate he did depart from the suggestion, by using words and forms of expression importing an independent order, rather than a reply to the offer of the

8th. If he had intended to "accept the Columbus offer, for ten or twelve hundred tons," he would have said so by that form of expression. Not having done that, the inference is legitimate that he did not intend his telegram and letter of the 16th to be a reply to the offer of the 8th.

We therefore submit that the order of the 16th, for 1,200 tons, was an independant order and not a reply to or rejection of the offer of the 8th, even if the difference as to quantity—1,200 tons instead of 2,000 tons—would have rendered a reply involving such difference, a rejection of the offer of the 8th; and that the Court below erred in charging the jury (see Record, p. 97) that "in law the offer or direction of the party to book its order for 1,200 tons was the offer of a *separate* and *independent proposition*, *and* in the light of the authorities which I have read, *that was* a *rejection* of the offer which had been made to the party." In thus charging the jury, the Court assumed that the order for 1,200 tons was the offer of a separate and independent proposition, and yet held it to be a reply to and rejection of the offer of the 8th—clearly an erroneous ruling, and to the direct effect that as the offer of the 8th was pending, the plaintiff was not at liberty to give an order for iron, though separate and independent of the offer of the 8th. It is true, that on page 98 of the Record, the Court, in its charge, says of the order for 1,200 tons: "If it be found that it was a separate and independent order, without *any reference* to that [the

proposition as offered originally], to book 1,200 tons, then it would not have the effect of a rejection of the offer." The best that can be said of the charge upon this point is, that it must have misled and confused the jury; and erroneously denied to the plaintiff the right to refer, for any purpose, even *for price*, to the offer of the 8th, in giving a separate and independent order for 1,200 tons.

2. If the telegram and letter of the 16th, in connection with Washburn's telegram to Hatch, be regarded as a reply to the offer of the 8th, it is not a reply proposing to accept of accepting upon terms varying from those offered, but a proposition accepting the offer as broadly as it was made. If in ordering the 1,200 of the 2,000 to 5,000 tons offered, March delivery, "*as per your favor of the 8th*," was a reply to the offer, it was at the same time an acceptance of it, upon its terms. That is the legal effect of the clause "*as per your favor of the 8th*," in connection with the order. The order for 1,200 tons must yield, as to the limitation of quantity, to the legal effect of the clause, "as per [*i. e. in accordance with*,] your favor of the 8th." Thus yielding, the order is an acceptance of the whole quantity (2,000 tons) offered. If that be the proper legal effect of the order for 1,200 tons, regarding it as a reply to the offer of the 8th, then the Court erred in charging the jury (Record, bottom of p. 97,) that "if it be found that this telegram and this letter [of the 16th] was a reply to the offer of the 8th, then it

was submitting a new proposition, which, in law, amounted to a rejection of the first proposition." Moreover, in thus charging, the Court took from the jury the question of the intention of the plaintiff in sending that order though professing to leave that question to the jury for determination, as noticed by us in our next proposition.

3. If in ordering the 1,200 tons, the plaintiff thereby intended to accept the offer of the 8th, upon its terms, the contract was complete. Such intention, if it existed, will be allowed to prevail, and the question of its existence was open for inquiry, upon the facts of the case. The Court in charging the jury, (Record, near bottom of page 97) says on this point: "For the present, that part of it I shall leave for the determination of the jury, as to the intent of the party, for it may consist of the intent. There is enough upon the facts, according to the view I take of it, to prevent the Court from determining absolutely the effect that these four telegrams have upon that question." Yet the Court refused to further charge that the order for 1,200 tons was not a rejection of the offer of the 8th, if the jury found that the plaintiff did not intend its order for the 1,200 tons to be a rejection of the defendant's offer of the 8th, but intended to give further orders for the residue of the 2,000 tons in acceptance of the offer prior to Dec. 20th, and did so. In refusing thus to charge, or to that effect, the Court left to the jury the question of intention, without proper or any instruction

as to its application, and thereby left the jury in confusion, and practically denied the plaintiff the benefit of its intention to accept the defendant's offer, in case the jury found the fact of intention in favor of the plaintiff.

4. The defendant's answer of the 18th to the plaintiff's order of the 16th, for 1,200 tons, leaves the defendant's offer of the 8th open for acceptance or rejection by the 20th, as if the order had been an inquiry or an independent proposition, and not a counter-proposition to the offer. The answer of the 18th did not withdraw the offer of the 8th, or even refer to it, in any manner. The only variance between the order for 1,200 tons and the offer of 2,000 tons related to *quantity*. The defendant's answer to that order did not object to it on the ground of *quantity*, but solely on the ground of *price*, and only "*at present*." Without questioning the rule that a direct counter-proposition to an offer is equivalent to a rejection, the rule should not be applied in this case, where the proposition pending the offer may be regarded as an inquiry or an independent propositon made prior to the date limited for accepting or rejecting the offer, and where the answer to the proposition did not object to it on any ground of variance between it and the offer, but only on the ground of price *at that time*, and in such form as reasonably led the plaintiff to conclude that the offer remained open for acceptance or rejection by the date limited.

II.

A contract having been made by the offer of the 8th and its acceptance on the 19th of December, for a delivery of the iron in March following—did the refusal of the defendant in January to be bound by the contract, entitle the plaintiff to damages measured by the market price of such rails at that date?

The Court below answered that question in the negative, by striking the amendment to the petition from the files as setting up immaterial and irrelevant matter. In thus deciding the question the Court erred.

The amendment to the petition shows that when the contract for the sale and purchase of the iron was made, both parties understood that it was for a *special use in March*, and that to get the iron for use in March, it was necessary to buy it in advance of that date to insure its being ready for use in March.

It was, therefore, within the contemplation of the parties that the defendant was not to fail to deliver the iron in March, but that if the defendant should fail or give notice of an intended failure to deliver the iron in March, the plaintiff might provide against such failure by purchasing elsewhere in time for use in March. The amended petition further shows that on receiving notice in January from the defendant of the intended failure to deliver the iron in March, the plaintiff gave the defendant a counter-notice that to meet the necessities of having the iron in March,

the plaintiff would at once purchase the iron for the March use, and did so accordingly.

The plaintiff's damage was the difference between the contract price of the iron and the market value in January.

Where a contract to deliver goods at a certain price is broken, the proper measure of damage in general is the difference between the contract price and market price of such goods *at the time when the contract is broken.* It is usually stated to be at the time when the goods were to be delivered, but it is only so stated because the breach usually consists in the non-delivery at that time.

The defendant broke the contract when he gave the plaintiff notice that defemdant *intended not to deliver the iron at all.* That was a complete breach then of the contract, on the part of the defendant, and gave the plaintiff a present right of action for the breach, and damages measured by current value at that date.

Benjamin on Sales (4th Am. Ed.) p. 641, §567. p. 643, §569.
Frost v. Knight, L. R. T. Ex. cas. 111.
Burtis v. Thompson, 42 N. Y. 246.
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Respectfully submitted,

C. N. OLDS and
L. J. CRITCHFIELD,
Attys. for Plaintiff in Error.

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Attorneys for Plaintiff in Error.

GAZETTE PRINTING HOUSE, COLUMBUS, OHIO.

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The defendant's counsel argues that upon the whole evidence the verdict is right; and, if not, the plaintiff has no remedy, for the reason that error does not lie to the ruling upon the motion for a new trial upon the weight of the evidence, and that there is no error in the charge

of the Court, and, if there was, no pertinent exceptions were taken to it.

In arguing that the verdict is right, counsel for the defendant insists :

(1) That the offer of December 8th was not open for acceptance—was not subsisting—on December 19th ; and

(2.) That even if it had been, the plaintiff's telegram of December 19th is not a sufficient acceptance of that offer.

(1.) In his argument that the offer of December 8th was not subsisting on the 19th, defendant's counsel brings to his aid certain incompetent matter and assumptions, to-wit : The conversation between Gen. Thomas and Mr. Martin, about December 15, 1879, in New York, and the telegrams which passed that day between Mr. Martin (Clark, Post & Martin), in New York, and Mr. Washburn, in Washington.

That conversation and those telegrams had no reference whatever to the offer of the defendant as contained in its letter of December 8th. Nor was Mr. Martin or his firm acting or authorized to act as the agent of the plaintiff in receiving from General Thomas any statement. The only relations existing then between Mr. Martin and the plaintiff was that Mr. Martin had contracted with Mr. Washburn to supply him a lot of cars. The contract did not include rails or other materials. (See Record, pages 88–89). Nor did Gen. Thomas make to Mr. Martin any statement in regard to the defendant's offer of December 8th, as assumed by defendant's

counsel, on pages 10 and 11 of his brief. And so the conversation between General Thomas and Mr. Martin, and the telegrams between Mr. Martin or his firm and Mr. Washburn, should be excluded from consideration.

Counsel for the defendant, on page 6 of his brief, says: "The last clause of defendant's letter of December 8th: 'If our offer is accepted, shall expect to be notified of same prior to December 20th, 1879,' clearly limited the time for acceptance and notification to that date. Whether it continued the offer to that time may be questionable. But if it did, then plaintiff had the right to reject the offer, or the defendant had the right to withdraw it at any time before."

Counsel do not state any reason why the offer did not continue to December 20th. We know of no reason. Conceding that the defendant had the right to withdraw the offer at any time before December 20th, if withdrawn before acceptance, it could not be done after acceptance. The offer never was withdrawn. The telegram of defendant dated December 18th did not pretend to withdraw it, and cannot be so construed. The only question is, was the offer rejected or accepted prior to December 20th?

The defendant's counsel argues that it was rejected by the plaintiff's order of December 16th, for 1,200 tons.

To that we now say, as argued more at large in our first brief (pages 13 etc.): (1.) That the order for 1,200 tons (telegram and letter) was not a reply to the offer of December 8th, but an *independent order*, and was so understood by the defendant. The plaintiff's letter

of the same date does not even refer to the offer of the 8th; (2) but if a reply to the offer of December 8th, it was an acceptance of that offer upon its terms. The telegram says, "*as per your favor of the 8th;*"—and (3) clearly so, if the plaintiff thereby intended the order for 1,200 tons to be an acceptance of the offer of the 8th—a question of fact not determinable by an inspection or construction of the paper alone, and which the Court left to the jury, but without proper instructions,—and (4) that the defendant's answer of the 18th to the plaintiff's order of the 16th for the 1,200 tons leaves the defendant's offer of the 8th open for acceptance or rejection by the 20th, as if the order for the 1,200 tons was an inquiry, if not an independent order,—it being competent for the defendant to thus regard it, and to leave the offer of the 8th open, even if it might technically have regarded the order for 1,200 tons as a counter-proposition.

Counsel for defendant, in claiming that Hatch's telegram and letter of the 16th for 1,200 tons was in response to the offer of the 8th, and therefore a rejection of the offer of the 8th, relies largely upon the idea that Hatch's order for 1,200 tons was in obedience to Washburn's telegram of the 16th to Hatch, saying, "I think you had better accept Columbus offer for *ten* or *twelve hundred*," and upon Hatch's testimony that Washburn's telegram refers to the offer of the 8th. We submit that the "Columbus offer" referred to by Washburn was not the offer of the 8th, but the offer referred to in Washburn's telegram of the 15th, to Clark, Martin & Post, in response to their telegram of the 15th to Wash-

burn, and that Hatch's testimony that Washburn's telegram of the 16th referred to the offer of the 8th is simply an assumption. If in fact Washburn did refer, in his telegram to Hatch, to the same "Columbus offer" that he mentions in his telegram of the 15th to Clark, Martin & Post (being the "Columbus offer" *they* mention in their telegram of the 15th to him), then Hatch's order for 1,200 tons on the 16th derives no definite character from the Washburn telegram of the 16th to Hatch, and it cannot be said, looking to the face of the correspondence, that Hatch's order for 1,200 tons was a rejection of the offer of the 8th.

(2.) The defendant's counsel argues that, even conceding that the offer of December 8th continued open for acceptance on the 19th, the telegram of the 19th did not sufficiently accept the offer to constitute a contract, "for at least one reason, and perhaps for two reasons":

"1st. The latter telegram of December 19th was in itself only a proposal, and required acceptance to complete a contract. It expressly calls upon the defendant to express its consent to the contract so proposed.

"2d. The plaintiff did not, by its telegram of December 19th, unqualifiedly accept the offer of the defendant as made in its letter of December 8th."

We briefly consider these reasons in their order:

The best answer to the first one is to read the telegram of December 19th, upon which we rely as a sufficient and complete acceptance of the offer:

"DEC. 19TH, 1879.

"*Columbus Rolling Mill Company, Columbus, O.:*

"Please enter our order for 2,000 tons rails as per your letter of the eighth. *Please forward written contract. Reply.*

"C. F. HATCH."

This telegram does not call upon the defendant to express its consent to any proposed contract. There is none proposed. The proposed contract was in the letter of the eighth. This telegram accepts the proposed contract, and thereby made it a concluded contract. The request: "Please forward written contract. Reply." is simply a request to have the concluded contract reduced more formally to writing, and to forward the written instrument as the more formal evidence of the concluded contract, and, by reply, to send it, or let the plaintiff know it was coming. The "written contract" was not essential, even as evidence of the completed contract, much less to make it. The offer of the 8th and the acceptance of the 19th, made the contract. They contained the assent of both parties and their mutual and unconditional obligations.

The second reason urged by defendant's counsel, that the acceptance of December 19th was not sufficient, is, that it does not "unqualifiedly accept the offer of the defendant as made in its letter of December 8th, in this: The offer is 2,000 to 5,000 tons. The acceptance is for only 2,000 tons. That the election as to quantity belongs to the defendant—a valuable right."

Under such an offer the option as to quantity belongs to the plaintiff—the buyer and not the seller—the option to take 2,000 tons or more, but not exceeding 5,000 tons. Under such offer of 2,000 *to* 5,000 tons there is no party to specify the quantity except the party to whom the offer is made. If the offer was *from* 2,000 *to* 5,000 it might be regarded as an offer of *more* than 2,000, but in the absence of the word *from* or its equivalent, the offer is 2,000 or more, up to but not exceeding 5,000 tons, at the option of the purchaser.

It is true, the telegram of the 19th, like the telegram of the 16th, does not use the word *accept*, but does use the words, "enter our order for two thousand tons rails, as per your letter of the 6th (8th)," and previously, on the same day, the plaintiff sent a letter to the defendant saying, "Your proposition holds good until December 20th." Taking the letter and telegram sent on the same day (19th) and the quantity—2,000 tons—the telegram of the 19th is sufficiently connected with the offer of the 8th to show it to be an acceptance of the offer, though not using the word "*accept.*" These connecting facts link the telegram of the 19th to the offer of the 8th as an acceptance of it, and show the difference between the telegrams of the 16th and the 19th though neither use the word "*accept.*"

We now come to the charge of the Court and consider the errors therein, as we see them. Connected with that consideration is the question of the intention of the plaintiff in ordering the 1,200 tons by its telegram of the 16th—whether it was intended as an order

independent of the offer of the 8th, as we claim, or as a counter proposition to that offer, and therefore a rejection of it, as claimed by the defendant. Counsel for defendant (in his brief, p. 20-21) says: "The only evidence of intention was found in the paper writings offered in evidence. Their construction was for the Court and not for the jury."

On page 97 of the Record the Court in charging the jury refer to the four papers: The offer of the 8th, the telegram of the 16th by Washburn to Hatch, the telegram of the 16th and the letter of the 16th by Hatch to the defendant; and as to whether the telegram and letter of the 16th constituted an order for 1,200 tons independent of the offer of the 8th—"a separate and distinct proposition" *without any reference to it*, the Court say: "For the present, that part of it I shall leave for the determination of the jury, as to the intent of the party, for it may consist of the intent. There is enough upon the facts, according to the view I take of it, to prevent the Court from determining absolutely the effect that these four telegrams have upon that question. If it be found that this telegram and this letter [of the 16th] was a reply to the offer of the 8th, then it was submitting a new proposition, which, in law, amounted to a rejection of the first proposition, and it was not in the power of the plaintiff after that to have accepted the proposition as offered originally. If it be found that it was a separate and independent order, *without any reference to that*, to book 1,200 tons, then it would not have the effect of a rejection of the offer. If you should

find that it was a rejection of the offer, then your verdict must be in favor of the defendant, for in law the plaintiff had no right so to accept. But if you find that it was an independent order, *without any reference to that in any way whatever*, then, if the plaintiff has complied with his portion of the contract and has suffered damages, you will determine what these damages are."

The objection the plaintiff's counsel took to this charge of the Court was this: The Court, in submitting to the jury the question of the intention of the plaintiff in ordering the 1,200 tons, made the question of intention of giving an independent order or a counter proposition, depend upon whether the order *did or did not refer to the offer of the 8th*. If it did, it was a rejection of the offer. If it did not, it might be regarded as an independent order. Whereas plaintiff's counsel claimed the order of the 16th would not, in law, necessarily be a rejection of the offer of the 8th, simply because, in ordering 1,200 tons of a certain kind of rails, it referred to the offer of the 8th *for terms as to price and time of delivery*, nor unless the jury found that order to be *a final and full reply* to the offer, in this, that the plaintiff had no intention to order, prior to the 20th, the residue of the 2,000 tons, in acceptance of the offer of the 8th; that intention being shown by the fact that the whole 2,000 tons were ordered on the 19th.

The plaintiff's claim as to the law being, (1) That the order for 1,200 tons might *refer* to the offer, and not be a rejection of it, but an independent order; or (2) might be an *acceptance* of the offer, if the plaintiff intended to

order the residue of the 2,000 tons within the time limited, and did so.

The Court differed with us, and we noted an exception. That we did except is shown on page 99 of the Record.

Not only did the Court erroneously differ with us upon the legal points mentioned, but in doing so confused the jury by stating to them that "in law the offer or direction of the party to book its order for 1,200 tons was the offer of a separate and independent proposition; and, in the light of the authorities which I have read, that was a rejection of the offer which had been made to the party." (Record, page 97.) And at the same time submitting to the jury the question of intention of the plaintiff in ordering the 1,200 tons. The charge was contradictory and misleading. Our exception noted to the charge is broad enough to cover the error in thus misleading the jury.

We concede, of course, that to warrant the reversal of a judgment for error it must be found in the record and be prejudicial to the party complaining. But we insist that the errors we have pointed out are found in the record, and are prejudicial to the plaintiff,—relating as they do to the question of contract or no contract, as distinguished from error relating to the measure of damages, which would not be prejudicial to the plaintiff if there was no contract. Respectfully submitted.

C. N. OLDS AND
L. J. CRITCHFIELD,
Attorneys for Plaintiff in Error.

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119-149

Supreme Court U. S.
FILED.
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In the Supreme Court of the United States,

OCTOBER TERM, 1885.

No. 282.

THE MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY,

Plaintiff in Error,

vs.

THE COLUMBUS ROLLING MILL COMPANY,

Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

BRIEF IN BEHALF OF DEFENDANT IN ERROR.

RICHARD A. HARRISON,

Of Counsel for Defendant in Error.

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was a contract, then, and then only, would the other question be of any importance.

The issue was submitted to a jury, who found that there was no contract. Thereupon, the court rendered judgment for the defendant.

It is argued by counsel for plaintiff that this finding is unsupported by the evidence and is contrary to law, and also that the Circuit Court erred in its instructions to the jury, and in not allowing a certain amendment to the petition.

The bill of exceptions taken by the plaintiff discloses *all the evidence* offered by either party. If this evidence shows that no contract was made, and that the verdict and judgment was right, and that no other could have been lawfully rendered, then, even if error intervened, it could not have prejudiced the plaintiff. The verdict and judgment must have been the same, had there been no error.

"If for any reason appearing in the record, it is clear that a plaintiff in error, who was also plaintiff below, cannot recover in the action, the court will not determine whether error was committed in instructions given to the jury respecting other parts of the case.

To warrant the reversal of a judgment, there must not only be error found in the record, but the error must be such as may have worked injury to the party complaining.

Brobst vs. Brock, 10 Wallace, 519.

MR. JUSTICE STRONG, (p. 528) says: "It would be idle to reverse the judgment and send the case back for a new trial, if it be certain that the plaintiff cannot recover in the action. In Greenleaf's Lessee vs. Birth, (5 Pet., 135) it was stated to be 'a general rule that when there are various bills of exceptions filed according to the local practice, if, in the progress of the cause, the matters of any of those exceptions become wholly immaterial

to the merits as they were finally made at the trial, they are no longer assignable as error, however they may have been ruled in the court below. There must be some injury to the party to make the matter generally assignable as error.' So in Campbell's Executors vs. Pratt et al., (2 Pet., 354) the court refused to reverse a decree of the Circuit Court, although an error had been committed, as no benefit could result to the appellant from the reversal."

To the same effect are

Decatur Bank vs. St. Louis Bank, 21 Wallace, 294.
Barth vs. Clise, 12 Wallace, 401.

The record here presents to this court the whole case, and the bill of exceptions contains all the evidence in it. The great bulk of the evidence relates solely to damages and is here immaterial. It only burthens the record, and ought not, we think, to have been inserted. The evidence in relation to the negotiations for a contract is in small compass, and consists of admitted telegrams and letters, (printed record, pp. 52, 90,) and the testimony of Mr. Hatch, (pp. 16, 17, 18, 27, 38,) of Gen. Thomas, (pp. 72, 73,) and of Mr Martin, (pp. 87, 88, 89.)

So far as concerns the question of contract or no contract, there is no conflict in the evidence. We submit that upon the uncontradicted evidence and the undisputed facts, it clearly appears that the case of the plaintiff upon this point, was inherently and fatally defective; that the verdict was right; and that if a new *venire* were awarded, the same verdict would have to be given. The controversy was, (1) as to whether or not on December 19, 1879, an offer of the defendant contained in its letter of December 8th, was still open for acceptance or rejection, and (2) as to whether or not a telegram and letter of the plaintiff dated December 19, was an acceptance of that offer.

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BRIEF IN BEHALF OF DEFENDANT IN ERROR.

The issue in the Circuit Court involved three questions:

1st. Was any contract concluded between the plaintiff and defendant?

2d. Was the plaintiff ready and willing to perform on its part?

3d. What was the amount of damages?

The primary question was as to the making of a contract. If there was no contract, then it was wholly immaterial, whether or not the plaintiff was ready to perform, or what would have been his damages in case there had been a contract. If there

was a contract, then, and then only, would the other question be of any importance.

The issue was submitted to a jury, who found that there was no contract. Thereupon, the court rendered judgment for the defendant.

It is argued by counsel for plaintiff that this finding is unsupported by the evidence and is contrary to law, and also that the Circuit Court erred in its instructions to the jury, and in not allowing a certain amendment to the petition.

The bill of exceptions taken by the plaintiff discloses *all the evidence* offered by either party. If this evidence shows that no contract was made, and that the verdict and judgment was right, and that no other could have been lawfully rendered, then, even if error intervened, it could not have prejudiced the plaintiff. The verdict and judgment must have been the same, had there been no error.

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The evidence clearly shows that Mr. Washburn, the president of the plaintiff company, was authorized to construct an extension of its line of railroad, and to purchase iron rails for that purpose. That Mr. Hatch, its general manager, acted under the direction and supervision of Mr. Washburn in negotiating and contracting for such material, and that Mr. Hatch was throughout his negotiations with the defendant in very frequent communication by letter and telegram with Mr. Washburn, (printed record, pp. 16, 17.) Excepting what passed between Gen. Thomas and Mr. Martin about December 15, 1879, in New York, and between Mr. Woolsey and Mr. Harrison or Gen. Thomas about Jan. 19, 1880, in Columbus, (which latter, we submit, is immaterial to the question in hand,) there was no communication in reference to the alleged contract between said parties plaintiff and defendant, other than by letter or telegram. This correspondence is set forth in the printed record, pp. 52, 53, 54. The language contained in these telegrams and letters which were necessarily in writing, was clearly ascertained, and its constructions and effect were, we submit, questions for the court.

Ellis vs. Crawford, 39 Cal., 523.

December 5th, 1879, the plaintiff wrote and sent to the defendant the letter following:

"MINNEAPOLIS, *Dec. 5th*, 1879.

"ROLLING MILL CO., Columbus, Ohio: *Gents:* Please quote me prices for 500 to 3,000 tons 50 lb. steel rails, and for 2,000 to 5,000 tons 50 lb. iron rails. March, 1880, delivery.

"Truly yours,

"CHARLES F. HATCH, G. M.

H."

Dec. 8th, 1879, the defendant wrote and sent to the plaintiff the letter following:

"COLUMBUS, *Dec. 8th*, 1879.

"CHARLES F. HATCH, ESQ., GEN'L MANAGER M. & ST. L. RAILWAY, Minneapolis, Minn.:

"*Dear Sir:* Your favor of the 5th inst. at hand. We do not make steel rails. For iron rails we will sell 2,000 *to* 5,000 *tons* of 50 lb. rail for fifty-four (54.00) dollars per gross ton, for spot cash f. o. b. cars at our mill, March delivery, subject as follows: In case of strike among our workmen, destruction of or serious damage to our works by fire or the elements, or any cause of delay beyond our control, we shall not be held accountable in damages.

"If our offer is accepted shall expect to be notified of same prior to Dec. 20th, 1879.

"Yours truly,

"W. A. HARRISON, *Sec'y.*"

Prest. Washburn was notified by Mr. Hatch of the contents of said letter of Dec. 8th, immediately after its receipt. (Hatch Cr. Ex., Interrogatory 15, Printed Rec., p. 18.)

On Dec. 15th Mr. Martin, after a conference with Gen. Thomas, sent to Mr. Washburn a telegram as follows (Printed Record, pp. 88, 89):

"NEW YORK, *December* 15, 1879.

"HON. W. D. WASHBURN, House of Rep., Washington, D. C.

"Can probably furnish you two thousand tons fifty iron rails, at Columbus, Ohio, at fifty-five dollars cash, March delivery, if answered immediately. Wire. Another large advance in British iron. Doubt your doing better than this price.

"CLARK, POST & MARTIN."

The same day Mr. Washburn replied (Printed Record, p. 89):

"*Dec.* 15, WASHINGTON, D. C.

"CLARK, POST & MARTIN:

"Rate from New Orleans to Burlington five dollars and fifty cents. Would not accept Columbus offer at present.

"W. D. WASHBURN, Pt."

On Dec. 16th, Mr. Washburn telegraphed to Mr. Hatch as follows (Printed Record, p. 18):

"WASHINGTON, *Dec.* 16.

"C, F. HATCH:

"I think you had better accept Columbus offer for *ten or twelve hundred.* "W. D. W."

This telegram, Mr. Hatch says, (Cr. Ex. 20½ ques., Record, p. 18), refers to the offer contained in defendant's letter of Dec. 8th.

After the receipt of this telegram from Mr. Washburn, Gen. Man. Hatch telegraphed to the defendant as follows (Cr. Ex. 17 ques., Printed Record, p. 18):

"MINNEAPOLIS, *Dec.* 18, 1879.

"W. A. HARRISON, SEC'Y ROLLING MILL CO.:

"Please enter our order for twelve hundred tons rail, March delivery, as per your favor of the eighth. Please reply.

"CHARLES F. HATCH,

"Gen'l Manager M. & St. L. R. R. Co."

Dec. 16th, 1879, the plaintiff wrote and sent to the defendant the letter following:

"MINNEAPOLIS, *Dec. 16th*, 1879.

"W. A. HARRISON, SEC'Y ROLLING MILL CO., Columbus, Ohio.

"*Dear Sir:* Yours of the 8th came duly to hand. I telegraphed you to-day to enter our order for *twelve hundred* (1,200) tons 50 lb. iron rails for next March delivery, at fifty-four (54) dollars f. o. b. cars at your mill. *Please send contract.* Also please send me templet of your 50 lb. rail. Do you make splices? If so, give me prices for splices for this lot of iron.

"Yours truly,

CHARLES F. HATCH, G. M."

The last clause of defendant's letter of Dec. 8th: "If our offer is accepted, shall expect to be notified of same prior to Dec. 20th, 1879," clearly limited the time for acceptance and notification, to that date. Whether it continued the offer to that time, may be questionable. But if it did, then plaintiff had the right to reject the offer, or defendant had the right to withdraw it, at any time before. Such rejection or withdrawal

would have terminated the offer and ended the treaty under it.

The plaintiff, by its telegram or letter of Dec. 16th, in reply to said offer of the defendant contained in said letter of the Dec. 8th, did not accept such offer; but, on the contrary, rejected it. The negotiation was in regard to the sale and purchase of from 2,000 *to* 5,000 *tons* of iron rails. The plaintiff inquired for what price the defendant would sell from 2,000 *to* 5,000 *tons* of iron rails. The defendant answered at what price per gross ton it would sell from 2,000 *to* 5,000 *tons* of iron rails. The plaintiff replied, "enter our order for 1,200 *tons* rails, March delivery, *as per your favor of the eighth.*" The clear meaning of this, both in common sense and in law, is, that the plaintiff declines to purchase from 2,000 to 5,000 tons of such rails as proposed in the defendant's offer on the terms proposed, but offers to take 1,200 *tons on such terms.* Every one would so understand it, and as readily as if written in those very words. To convey this signification it was unnecessary to stuff the telegram or letter with further words than those used.

To constitute an acceptance of an offer "the assent must comprehend the whole proposition; it must be exactly equal to its extent and provisions, and it must not qualify them by any new matter."

1 *Parsons on Contracts*, *476.

"But there are cases where the answer, either in words or in effect, departs from the proposition, or varies the terms of the offer, or substitutes for the contract tendered one more satisfactory to the respondent. In these cases there is no assent and no contract. The respondent is at liberty to accept wholly, or to reject wholly; but one of these things he must do; *for if he answers, not rejecting, but proposing to accept under some modifications, this is a rejection of the offer.* The party making the offer may renew it; *but the party receiving it cannot reply, accepting*

with modifications, and, when these are rejected, again reply, accepting generally, and upon his acceptance claim the right of holding the other party to his first offer."

1 *Parsons on Contracts*, *477.

"But the assent must, in order to constitute a valid contract, be mutual and intended to bind both sides. It must also coexist at the same moment of time. A mere proposal by one man obviously constitutes no bargain of itself. It must be accepted by another, and this acceptance must be unconditional. *If a condition be affixed by the party to whom the offer is made, or any modification or change in the offer be requested, this constitutes in law a rejection of the offer* and a new proposal, equally ineffectual to complete the contract until assented to by the first proposer. Thus, *if the offer by the intended vendor be answered by a proposal to give a less sum, this amounts to a rejection of the offer, which is at an end, and the party to whom it was made cannot afterwards bind the intended vendor by a simple acceptance of the first offer.* The cases are very numerous in support of these principles, which are common to all contracts."

Benjamin on Sales, § 38.

In *Hyde vs. Wrench*, 3, Beavan 336, defendant offered to sell his farm to plaintiff for £1,000. The plaintiff, thereupon, offered him £950, which defendant refused. Plaintiff then accepted the offer at £1,000, but defendant declined to complete the bargain. Held, on demurrer, by Lord Langdale, that when plaintiff, instead of accepting the first offer unconditionally, answered it by a counter-proposal to purchase at a lower price, "*he thereby rejected the offer*," and that no contract had ever become complete between the parties.

"An offer of a bargain by one person to another imposes no obligation upon the former unless it is accepted by the latter according to the terms on which the offer was made. Any

qualification of, or departure from, those terms invalidates the offer, unless the same be agreed to by the party who made it."

Eliason vs. Henshaw, 4 Wheaton, 225.

The above case was cited and the principles of the decision reaffirmed in *Carr vs. Dural*, 14 Peters, 77.

In *National Bank vs. Hall*, 101 U. S., 50, MR. JUSTICE SWAYNE, in delivering the opinion of the Court, says: "*A proposal to accept, or acceptance upon terms varying from those offered, is a rejection of the offer.*"

"An acceptance, to be good, must in every respect meet and correspond with the offer made, neither falling within nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand."

"*A proposal to accept an offer on terms varying from those proposed amounts to a rejection of the offer and a substitution in its place of a counter proposition*, which cannot become a contract until assented to by the first proposer. *The original offer thereby loses its validity, and is no longer pending between the parties*, and it becomes an open proposition again only when renewed by the party who first made it; hence, the party who submitted the counter proposition cannot, without consent of the other, withdraw or abandon the same, and then accept the original offer, which he has once virtually rejected."

Fox vs. Turner, 1 Bradwell, 153.

See also *Jenness vs. Mount Hope Iron Co.*, 53 Maine, 20.

Potts vs. Whitehead, 23 N. J. Eq., 512.

The plaintiff, by its telegram and letter of Dec. 16, did not accept the defendant's proposal; but, on the contrary, proposed a contract more satisfactory to itself. That the plaintiff thereby rejected the offer of the defendant is well settled. This left under discussion only the offer of the plaintiff conveyed by said

letter and telegram. And manifestly the parties knew the law and legal effect of that telegram and letter of Dec. 16. The plaintiff did not even attempt to keep alive the offer of Dec. 8, or the right to reject it once and accept it afterward; nor could it have done so if it had wished to. It attached in its new proposal no condition in reference to the proposal of the defendant. It did not say that it proposed to take 1,200 tons on the condition that such new proposal shall not end our consideration of your offer to sell from 2,000 to 5,000 tons; nor did it say that it reserved the right to further consider the proposal of the defendant; nor did it even intimate that it would in any event give it any further consideration. In its *letter* of Dec. 16 it says: "I telegraphed you to-day to enter our order for 1,200 tons. * * * Please send contract; also * * * Give me prices for splices for this lot of iron." And it says nothing and intimates nothing about further consideration of the offer of the defendant.

Such being the contents and legal effect of the telegram and letter of Dec. 16, this ends the case. The verdict and judgment were properly for the defendant.

After the proposal of Dec. 16 to take 1,200 tons, and the refusal of the plaintiff to take from 2,000 to 5,000 tons, the defendant never renewed its offer to sell from 2,000 to 5,000 tons.

Dec. 18, 1879, the defendant wrote and sent the plaintiff the following telegram:

"C. F. HATCH:

"We cannot book your order at present at that price.

"C. R. M. Co."

As soon as the letter of defendant of Dec. 8th was received, Gen. Washburn was informed of all the terms of the offer contained in it. On Dec. 15th the agents of the plaintiff in New

York, Clark, Post & Martin, were informed by Gen. Thomas that the plaintiff had not accepted the offer of the defendant, and that the defendant would not then sell 2,000 tons of iron rails at any less price than $55 per ton. Gen. Thomas then, in behalf of the defendant, offered said Clark, Post & Martin to sell the plaintiff 2,000 tons at $55 per ton. Thereupon Clarke, Post & Martin, on Dec. 15th, by telegram advised Gen. Washburn of said last offer, which he declined to accept. On the next day, Dec. 16th, Gen. Washburn telegraphed to Mr. Hatch: "I think you better accept Columbus offer for ten or twelve hundred tons;" and Mr. Hatch thereupon sent to the defendant the telegram and letter of Dec. 16th.

If the plaintiff was not before sufficiently informed, as it undoubtedly was, that the defendant was unwilling to longer continue the offer of Dec. 8th, it was certainly so advised by said telegram from the defendant of Dec. 18th. While the telegram was in the condensed form usual in such messages, it was perfectly intelligible. The plaintiff knew that defendant was then demanding the price of $55 per ton for iron rails sold in the quantity of 2,000 tons, and the telegram of Dec. 18th distinctly informed the plaintiff that the defendant would not then contract *at that price* of $54 per ton. No special formality is required to recall an offer. If one offers to sell at a certain price, and before his offer is accepted, informs the party to whom it was made that he will not sell at that price, it is unnecessary for him to further say that he withdraws his offer to sell at that price.

See *Dickinson vs. Dodds*, 2 Law Rep. (Ch. Div.), 463.

The telegram of plaintiff sent Dec. 19th, and saying—"your proposition holds good until Dec. 20th; do you decline to carry it out?"—shows that the plaintiff then understood that the defendant was not minded, but declined to continue its offer.

Else why send such a message? Why did the plaintiff then do anything more than notify the defendant of an acceptance of their offer? By this telegram the plaintiff clearly meant to call the attention of the defendant to the last clause of said letter of Dec. 8th, and to inform the defendant that, by reason of what subsequently transpired, the plaintiff presumed that the defendant no longer proposed to continue its offer to Dec. 20th, and to inquire of the defendant whether its presumption was correct.

Dec. 19th, in the morning, (Re-cross examination, ques. 31, Printed Record, p. 38), the plaintiff wrote and sent to the defendant the telegram following:

"COLUMBUS ROLLING MILL CO.:

"Your proposition holds good until Dec. 20th. Do you decline to carry it out? C. F. HATCH."

Dec. 19th, in the afternoon (*ibid*), the plaintiff wrote and sent to the defendant the telegram following:

"COLUMBUS ROLLING MILL CO.:

"Please enter our order for 2,000 tons rails as per your letter of the eighth. *Please forward written contract. Reply.*

"C. F. HATCH."

If before this the offer contained in the letter of Dec. 8th had been rejected or withdrawn, then these telegrams were of no effect in completing any contract. But if we concede, for the sake of argument, that said offer then continued, still the telegrams of Dec. 19th did not suffice to constitute a contract, for at least one reason, and perhaps for two reasons:

1st. *The latter telegram of Dec. 19th was itself only a proposal, and required acceptance to complete a contract.* It expressly calls upon the defendant to express its consent to the contract so proposed.

To constitute a valid contract there must be a complete and final assent of one party to the proposal of the other. The assent must be independent of any further negotiation or response, and the obligation of the parties must be mutual and complete. Until the plaintiff became unconditionally bound, the defendant could not be bound.

Here the plaintiff at least doubted whether the defendant would then enter their order for 2,000 tons rails. It was surely reasonable that it should at least so doubt. It desired to leave no room for future controversy. It therefore coupled its order with *a requirement of reply and a written contract. It required further communication in order to a completion of a contract.* If the order for 2,000 tons was intended to be a consummation of the contract, why require a reply? Surely it would be sufficient to forward a written contract without further telegraphic correspondence. The subsequent telegrams show that the plaintiff did not intend to be bound, or understand that there was any binding contract, without a reply and assent by the defendant.

If any contract was completed it was before Dec. 27th, 1879. To test the question whether *at that time* any contract, mutually obligatory, existed, let us suppose that all correspondence then ceased until the following March; that the market price for such rails had fallen to $30 per ton; that the defendant then tendered to the plaintiff the 2,000 tons, which the plaintiff refused to receive; and that the defendant thereupon sued the plaintiff for the difference between the contract and the market prices. Might not, in such case, the plaintiff have well claimed that no contract was completed? It might then well say that its telegram of Dec. 19th required a reply, and the parties must have expected that the defendant would signify his assent to the order before the same should become binding. Or suppose further that on Dec. 27th the plaintiff had telegraphed to

the defendant that not having received any reply to its telegram of Dec. 19th, it recalled its order. Under such circumstances, could the defendant have recovered damages for a breach of contract? If a final contract was made on Dec. 19th, it could and if not so made, it could not.

"A letter referring to a previous verbal proposition, stating its terms according to the understanding of the writer, accepting them, and requiring the party addressed to acknowledge his acceptance in writing, does not constitute a contract, but a proposition for a contract."

Hough vs. Brown, 19 New York, 111.

2d. *The plaintiff did* NOT, *by its telegram of Dec. 19th, unqualifiedly accept the offer of the defendant as made in its letter of Dec. 8th.*

"The assent must comprehend the whole of the proposition; it must be exactly equal to its extent and provisions, and it must not qualify them by any new matter." In short, it must be equivalent to saying simply, "I accept your offer." Now, if the plaintiff, in answer to the letter of the defendant of Dec. 8th, had said, we accept your offer as made in that letter, the contract, *on the part of the defendant*, would have been of the sale of "2,000 TO 5,000 TONS of 50 lb. iron rails for $54 per gross ton for spot cash f. o. b. cars at its mill, March delivery, subject as follows: In case of strike among its workmen, destruction of or serious damage to its works by fire or the elements, or any cause of delay beyond its control, it should be held accountable in damages." Under such a contract, the election as to what quantity should be delivered between the amounts named, was a very valuable right. It would be to the interest of the defendant, if prices fell, to deliver the larger quantity; and if the price rose, to deliver the lesser. This

election would, under said contract, have belonged to the defendant.

The telegram of Dec. 19th, did not accept the offer of the defendant to sell and deliver 2,000 to 5,000 tons at its election, and as it might, within that limit, think it to its advantage to do; but proposed to buy only 2,000 tons, and not to allow the defendant to increase the amount, if it desired to do so. This proposal of the plaintiff the defendant did not accept.

Suppose the plaintiff had telegraphed that it accepted the offer of the defendant and required delivery to be made March 15th, 1880. This would not have been a sufficient acceptance, for the reason that under the terms of the offer the defendant had the option as to the time in March when it should deliver the rails. But the defendant had the election, within the prescribed limits, as to *quantity* as clearly as it had as to *time*, and for the same reasons.

The learned counsel for the plaintiff, in their brief (p. 12), say: "We recognize the rule of law adopted by the court below, that "a proposal to accept or acceptance upon terms varying from those offered, is a rejection of the offer." Then they proceed to argue that plaintiff's telegram and letter of Dec. 16th, was not a proposal to accept or acceptance upon terms varying from those offered. With all due respect, we submit that this telegram and letter speak in language too plain to admit of much argument.

The first contention of counsel for plaintiff is that this letter and telegram are not in reply to the offer contained in the letter of the defendant of the 8th and had no relation to it whatever; that it was not a counter-proposition, or an answer varying the terms of an offer made or substituting for the offer another

proposition; but that it was an independent and wholly separate proposition, having no reference to any offer, and such that, if the defendant had accepted it, and booked the order for 1,200 tons, the offer of the defendant to sell from 2,000 to 5,000 tons would have still subsisted and remain untouched, so that the plaintiff might have accepted it at any time afterward before the 20th, and held the defendant to the delivery of from 2,000 to 5,000 tons *in addition to the* 1,200 *ordered.* In support of this, they urge that "the telegram and letter do not, *in direct words*, *express* any proposal to accept, or any acceptance of the offer" (plaintiff's brief, p. 13); that "Hatch, in sending the plaintiff's telegram and letter of the 16th to the defendant, does not use the word *accept*, but does use the words "enter our order for twelve hundred tons," just such form of words as would be used in giving an independent order for 1,200 tons, and not a reply to the offer of the 8th, holding the question of accepting or rejecting that offer under advisement" (p. 14); that "if he had intended to" accept the Columbus offer for ten or twelve hundred tons "he would have said so by that form of expression" (p. 15); and that "not having done that, the inference is legitimate that he did not intend his telegram and letter of the 16th to be a reply to the offer of the 8th." But we submit that no technical words or special formality are required in making an offer or counter-offer, or in accepting or rejecting either. The substance of the thing is looked at. The words "enter our order for 1,200 tons" are clear and intelligible and mean "we will take 1,200 tons," and you may therefore enter our order for that amount on your books. The defendant had offered in its letter of the 8th to sell 2,000 to 5,000 tons rails, March delivery, on certain specified terms. The plaintiff thereupon answered "please enter our order for 1,200 tons rails, March delivery, *as per your favor of the 8th.*" This surely means that the plaintiff

would not take 2,000 tons or 5,000 tons or any amount between 2,000 and 5,000 tons, but would take 1,200 tons, March delivery, as per defendant's favor of the 8th. If the defendant had accepted the offer of the plaintiff to enter 1,200 tons, surely it would have ended all further treaty under defendant's offer of the 8th, and for the reason that it was a proposition counter thereto.

But the argument of the plaintiff, based upon a nice criticism of the language used in plaintiff's telegram and letter of the 16th, if sound, is fatal to its case. If the plaintiff's telegram of the 19th was not in reply to defendant's letter of the 8th, and was an independent and wholly separate proposition to enter an order for 2,000 tons having no reference to any offer, then the defendant never accepted this proposition and there was no contract. Now, the wording of the telegram and letter of the 16th and of the telegram of the 19th is almost literally the same. The telegram of the 16th reads: "Please enter our order for twelve hundred tons rails, March delivery, as per your favor of the 8th. Please reply." The letter of the same date says: "Please send contract." The telegram of the 19th reads: "Please enter our order for two thousand tons rails, as per your letter of the 6th (8th). Please forward written contract. Reply."

What difference can be found in the language of these two communications to indicate that the latter was in reply to and acceptance of an offer made by the defendant, while the former had no reference to any offer, and merely contained an independent proposal? The telegram of the 19th does not use the word "accept," but does use the words "Enter our order for 2,000 tons." Following the argument of counsel for plaintiff, this is "just such form of words as would be used in giving an independent order for '2,000' tons, and not a reply to the offer

of the 8th, holding the question of accepting or rejecting that offer under advisement," and "if he (Hatch) had intended to accept the Columbus offer for '2,000' tons, he would have said so by that form of expression, and, not having done that, the inference is legitimate that he did not intend his telegram" of the 19th "to be a reply to the offer of the 8th." If this point is well taken, than defendant's offer and letter of the 8th was never replied to at all, and its proposal was never rejected or accepted. If this point is unsound, then it is clear that plaintiff twice replied to this letter and offer of the 8th: first, by an acceptance upon terms varying from those offered, or by a counter proposal to take only 1,200 tons, and not 2,000 to 5,000 tons; and next by an acceptance for or proposal to take 2,000 tons.

If the language of plaintiff's telegram and letter of the 16th, sent by its general manager, Mr. Hatch, had left any room for a question as to whether or not they related to defendant's letter of the 8th, and contained an acceptance upon terms varying from those offered in that letter, or a counter proposal thereto, the evidence of Mr. Hatch, offered by the plaintiff, surely removed all tenable ground for controversy about it. He testified (printed record, p. 18) that he notified Mr. Washburn of the offer contained in defendant's letter of the 8th almost immediately after its receipt, and informed him of the terms of the offer; that on Dec. 16th, and before he telegraphed to the defendant the order of Dec. 16th for 1,200 tons of rails, March delivery, he received instructions from Mr. Washburn in regard to sending such order by telegram from Washington, which read: "Washington, Dec. 16th, F. Hatch—I think you had better *accept* Columbus offer for ten or twelve hundred tons. W. D. W.;" and that this referred to defendant's offer as contained in their letter of Dec. 8.

The second contention of counsel for plaintiff (as we understand it) is that plaintiff's telegram and letter of Dec. 16th were in reply to the offer contained in defendant's letter of the 8th, and were an unqualified acceptance of such offer (printed brief, p. 16). They insist that this follows from the use of the words "*as per your favor of the 8th*" as the legal effect of such clause. We admit that if the telegram of Dec. 16th had read: "Please enter our order for rails, March delivery, as per your favor of the 8th," it would have contained an unqualified acceptance of defendant's offer. But the plaintiff did not intend to and did not send such a telegram. On the contrary, its president instructed its general manager to accept Columbus offer for ten or twelve hundred tons, and thereupon its general manager, intending so to do, telegraphed the defendant: "Please enter our order for *twelve hundred* tons rails, March delivery, as per your favor of the 8th." The object of inserting the words "twelve hundred tons" was plain enough, and was not illegal, and was perfectly well understood by everybody. It meant that the plaintiff would not take from 2,000 to 5,000 tons rails, but would take 1,200 tons, as per defendant's favor of the 8th. Still, plaintiff in argument complains that the Court below charged the jury that "if it be found that this telegram and this letter of the 16th was a reply to the offer of the 8th, then it was submitting *a new proposition*, which, in law, amounted to a rejection of the first proposition." This is certainly sound, if an offer to sell 2,000 to 5,000 tons is one thing and an offer to buy 1,200 tons is another and different thing. Surely the defendant might not, upon the receipt of said order for 1,200 tons, have entered an order for from 2,000 to 5,000 tons, and held the plaintiff bound to receive that amount. Still, this appears to be contended for by our opponents, who say that the specific and plain limitations in regard to quantity must yield

to some indefinite and mysterious "legal effect of the clause, as per (i. e., in accordance with) your favor of the 8th." Whence this legal effect arises, or by what authorities it is sustained, is not pointed out. It appears to us that the only legal effect of the clause "as per your favor of the 8th" is to refer to that letter for all the terms except the one expressly modified and varied term, to wit: that the quantity offered on those terms should be changed from 2,000 to 5,000 tons to the quantity of 1,200 tons. So everybody would understand it; and we know not of any reason why the legal effect of the matter should be at variance with the plainest common sense.

Counsel for plaintiff (printed brief, p. 17) further contend that the Circuit Court should have charged the jury "that the order for 1,200 tons was not a rejection of the offer of the 8th if the jury found that the plaintiff did not intend its order for 1,200 tons to be a rejection of the defendant's offer of the 8th, but intended to give further orders for the residue of the 2,000 tons in acceptance of the offer prior to December 20th, and did so."

We may not clearly apprehend this point. If it means that, as a matter of law, a proposal to accept, or acceptance upon terms varying from those offered, is not a rejection of the offer, unless the party actually intended it as such rejection, and that a counter proposition to an offer is equivalent to a rejection only in case the party making it intended that it should operate as a rejection, then we submit that the proposition is not sustained by any authority and is unsound. It is the intention of a party, as manifested by or to be reasonably inferred from his conduct and language, which governs. His secret intentions and mental reservations in negotiations cannot affect the person with whom he is dealing.

The only evidence of intention was found in the paper writ-

ings offered in evidence. Their construction was for the Court and not for the jury.

There was no evidence in the case to which such an instruction would have been pertinent. Such a purpose or intention as that referred to would have been most capricious and absurd. If a man has received in December an offer to sell to him 2,000 tons of rails to be delivered in the succeeding March, and has allowed him 12 days to accept the offer, and he intends to accept it, what imaginable reason could exist for his sending on his acceptance by piecemeal—say 200 tons per day. He knows that until he accepts for the 2,000 tons there will be and can be no bargain, and that all his orders or acceptances for any less amount will be idle nullities and the sheerest child's play.

No such instruction was requested. The plaintiff alleged in a motion for new trial that some such instruction was requested and refused. But the record nowhere shows that such instruction was requested, or that the allegation in said motion for new trial was true.

This court will not examine evidence to ascertain whether a jury was justified in finding, as it has done, on an issue of fact. The action of the Circuit Court in refusing to grant a new trial is not reviewable here on error.

Pomeroy vs. State Bank of Indiana, 1 Wall., 592.
Express Company vs. Ware, 20 Wall., 543.
Gregg vs. Moss, 14 Wall., 564.
Hall vs. Weare, 92 U. S., 728.
Railway Company vs. Heck, 102 U. S., 120.

It does not clearly appear that the plaintiff has assigned any error in the charge of the court to the jury.

It does not clearly appear from the record that the plaintiff at the trial took any exceptions to the charge of the court *as actually and finally given* (Printed Record, p. 99). It may be claimed from the statements of the bill of exceptions, that the plaintiff noted exceptions in the matter of charging the jury in three particulars, and three only (Printed Record, p. 99):

(1) For a refusal to instruct, as requested, in regard to the allowance of interest, as matter of right, in the assessment of damages. Counsel for plaintiff do not argue here that there was any error in that regard. Nor, in case there was no contract, is it of any moment what the court charged on the question of damages.

(2) To the point: "That if the jury find the order for 1,200 tons was intended by the plaintiff as its acceptance of the proposition, it would be regarded as a rejection in law of the proposition." We cannot find from the record that any such instruction was given to the jury. It certainly was not given in that language.

(3) To the point: "That, if the jury should find that the order for 1,200 tons was an independent proposition, but that it referred to the letter of the 8th, containing the proposition, as to the terms as to price and time of delivery, it would, nevertheless, remain an independent proposition." We cannot find from the record that any instruction was given in this language. If it had been, it would have been an instruction *in favor of the plaintiff*. It will be observed that the bill of exceptions states that, after the plaintiff had noted an exception to this last point, the court did give to the jury an instruction in relation to the matter, which was decidedly favorable to the plaintiff. We opine that the bill of exceptions misstates "an exception" in this matter, when a "request to charge" is meant.

It is, we submit, very manifest from the reading of the record, that the plaintiff not only did not except to any part of the charge *as really given*, but that it did not then suppose that it had any ground for such exception. It may be readily gathered from its charge and from its ruling on the motion for new trial that the court below was of opinion that plaintiff's telegram and letter of the 16th contained a counter proposition to defendant's offer of the 8th, and a rejection of such offer, which was not open for acceptance on the 19th, and that this was fatal to the case of plaintiff, and left no substance in it. The court thereupon, being of opinion that the case was with the defendant on this point, resolved all doubts on other points in favor of the plaintiff in order to terminate the litigation. It stated the general rules of law pertinent to the case as counsel for the plaintiff in their brief admit them to be. It then took up the admitted correspondence, and commented on plaintiff's letter of the 5th, defendants's letter of the 8th, and plaintiff's telegram of the 19th. It held against the defendant, and charged the jury that plaintiff's telegram of the 19th contained a sufficient acceptance of defendant's offer of the 8th, if such offer was then still open for acceptance. It then took up and commented upon plaintiff's telegram and letter of the 16th. It held that the *quantity*, 2,000 to 5,000 tons, mentioned in defendant's offer of the 8th was a material term or condition of its proposal, and that an acceptance of 1,200 tons would not be an acceptance of an offer of 2,000 tons. It then speaking further to this point, said: "therefore, in law, the offer or direction of the party to book its order for 1,200 tons was the offer of a separate and independent proposition, and in the light of the authorities which I have read, that was a rejection of the offer which had been made to the party." Possibly a more happy mode of expression would have been: "therefore, in law, the direction of

the party to book its order for 1,200 tons was the offer of a *different*, and substantially *variant* proposition." But the language employed in its connection meant precisely the same thing. It could not have been misunderstood, *and the plaintiff took no exception to it.* The court itself decided that the proposition contained in the telegram and letter of the 16th was substantially different and variant from the offer contained in the letter of the 8th, and left nothing for the jury to decide upon that question. So the remarks of the court upon this head, however inadvertently worded, could not have misled the jury. Then the court proceeded to another question, to wit: whether the telegram and letter of the 16th were in reply to or had any reference to the offer of the 8th, or whether they related to some wholly distinct and different matter. Upon this, the court said that it left the question whether, taking all the testimony in the case, it was the purpose and intention of the party in making this offer to make it as an acceptance to that extent of the offer which had been made by the party originally, or whether it was an independent order to book independently 1,200 tons of iron. It then commented on the telegram and letter of the 16th, and said "it is a matter of inference to be drawn from both these and other telegrams in the case." It then commented on the telegram from Washburn to Hatch, and said that this, "in connection with the others, is a matter to be taken into consideration in determining the fact whether this letter and telegram of the 16th related wholly to the offer of the party to deliver from 2,000 to 5,000 tons of iron, contained in the letter of December 8th, or whether it was independent and separate and distinct proposal, without any reference to it. For the present, that part of it I shall leave for the determination of the jury as to the intent of the party, for it may consist of the intent.' Thereupon the court proceeded in the clearest terms to

instruct the jury to find whether the letter and telegram were in reply to the offer of the 8th, or whether they contained a separate and independent order to book 1,200 tons, without any reference in any way to said offer of the 8th. So far as related to the making of a contract, this was the only question left to the jury. Certainly it is unimportant whether or not any verbal inaccuracies can be found in the preceding opinion of the court in regard to matters, which it passed upon and were not submitted to the jury.

The defendent excepted to all parts of the opinion and charge of the court, except that which related to the general propositions of law admitted by the plaintiff, and that which related to an order for 1,200 tons being substantially variant from an offer to sell 2,000 tons. The defendant contended then, and is still of opinion, that inasmuch as there was no controversy about the sending, receipt or contents of the telegrams and letters, their construction and effect were questions for the court alone, and that the jury should have been instructed to find for the defendant. But, if the court erred in this particular, and submitted to the jury a question which it ought itself to have decided for the defendant, the plaintiff was not injured thereby, and has no ground for complaint. The plaintiff made no exception to the submission of the question to the jury.

Aside from the fact that the plaintiff did not take any due exception to the charge of the court, it is clear that the plaintiff had no ground for complaint thereto, unless the court ought to have held as a matter of law that the plaintiff's telegram and letter of the 16th had no relation to the offer contained in defendant's letter of the 8th, and were not in answer thereto, and did not contain any counter-proposals. If the question ought to have been submitted to the jury, it was so submitted and found against the plaintiff. If the question ought to have

been decided by the court against the plaintiff, then it is not injured by the fact that the jury so decided.

"Though there may be plain error in a charge, yet if the record present to this court the whole case, and if it be plain from such whole that if the court had charged rightly, the result of the trial would have been the same as it was, this court will not reverse."

Decatur Bank vs. St. Louis Bank, 21 Wallace, 294.

MR. JUSTICE DAVIS, in delivering the opinion of the court, says (*ibid* 301): "It is true, the judge of the Circuit Court instructed the jury that the letter of September 21st, which leaves out the terms "on shipment of cattle" constituted the contract of guarantee between the plaintiff and defendant, but the result would have been the same if he had charged the jury, as we are of opinion that he should have done, that the rights of the parties were to be determined by the terms of the original letter of credit of the 13th September."

"In either aspect of the case the judgment must have been for the plaintiff below, and to warrant the reversal of a judgment there must be not only error found in the record, but the error must be such as may have worked injury to the party complaining."

"The bill of exceptions contains all the evidence in the case, and though the jury may have found their verdict on a wrong theory of the case, yet as the court can see that the verdict was correct, the plaintiff in error is not harmed by the misdirection of the judge. The result is right, although the manner of reaching it may have been wrong."

"When the record shows that the case of a plaintiff is inherently and fatally defective, a judgment against him will not be reversed for instruction however erroneous."

Barth vs. Clise, 12 Wallace, 401.

MR. JUSTICE SWAYNE (pp. 402, 403) says: "The bill of exceptions purports to contain *all* the testimony. * *

"The plaintiffs in error, according to their own showing, had not the shadow of a right to recover in this action against Clise. Conceding, for the purposes of this opinion, that the court erred in all the particulars complained of, the errors have done them no harm. Opposite rulings could not have helped them. Their case was inherently defective. The defect was incurable and inevitably fatal. When such a defect exists, whether it be or be not brought to the attention of the court below or of this court by counsel, it is our duty to consider it and give it effect. This is decisive of the case before us. The defendant in error is entitled to have the judgment affirmed."

"Where the evidence is such that, as to a given matter, there is no question for the jury, a charge and a refusal to charge in regard to such matter are not a ground for reversing the judgment, because they work no injury to the party excepting."

Ames vs. Quinby, 106 U. S., 342.
See also *Walbrun vs. Babbitt*, 16 Wallace, 577.
Railway Co. vs. Whiton's Adm'r, 13 Wallace, 271.

The *amendment to the petition* related solely to the measure of damages. It appearing upon the whole case that there was no contract, the plaintiff could have received no help or harm from any ruling of the court as to what would have been the measure of damages in case there had been a contract. If there was no contract, there were no damages. And so it must have been decided on the former trial, and so it must be decided on any future trial, let the rule as to damages, in case there was a contract, be what it may. If the verdict had been rightly for the

plaintiff, then only would the question as to the amount of damages to be assessed have become material. It can only become material here in the event that this court should reverse the judgment of the court below because of some matter relating to the merits other than damages.

The matter of allowing or disallowing amendments in actions at law rested in the discretion of the court below, and is not reviewable here. The record shows that the original petition was filed May 8, 1880; that defendant answered June 8, 1880, and then put the cause completely at issue; that the plaintiff took the depositions of Mr. Hatch and Mr. Woolsey in October, 1880, (printed record, p. 44); and of Mr. Post in November, 1880, (p. 55); that the defendant took the deposition of Mr. Martin in November, 1880, (p. 87); that afterward, on Dec. 17, 1880, leave was granted plaintiff to amend its petition in 30 days; and that afterwards on Dec. 22, plaintiff filed this particular amendment (p. 4). No leave to file this particular amendment was granted. While leave was granted to plaintiff to amend his petition within 30 days thereafter, this is to be held to be leave to file such amendment only as the court might deem proper under the circumstances. It did not withdraw from the court its discretion as to allowing the amendment to remain on file after it should have had the opportunity to inspect and consider it. It was still, after the amendment was presented and examined, to determine whether or not it ought in furtherance of justice, and under all the circumstances, to grant to the plaintiff the privilege of so changing his case, and of requiring the defendant to plead anew. After the amendment so came on the files, the defendant moved the court to strike it therefrom, because "said amendment is not such as ought to be allowed," and the court sustained such motion (printed record, p. 5).

What reasons influenced the court to so exercise its discretion, does not appear. We submit that its action is not reviewable. The case is substantially the same as it would have been had the plaintiff asked leave to file this particular amendment and such leave had been refused.

But the new averments sought to be made, and the new issues sought to be raised, by this amendment, were immaterial and irrelevant.

The cause of action set forth in the original petition was a breach on the part of the defendant of an alleged contract in December, 1879, to deliver to the plaintiff at Columbus, Ohio, in March, 1880, two thousand tons of iron rails for the price of $54 per ton, to be paid on such delivery, to the damage of the plaintiff in the sum of $32,000.

Under these alleged circumstances, it is well settled that the measure of damages for such breach of contract, is the difference between the contract price and the market value of such iron rails at Columbus at the time for such delivery.

Shepherd vs. Hampton, 3 Wheat., 200.
Grand Tower Company vs. Phillips, 23 Wall., 471.
McCollum vs. Huntington, 51 Ind., 229.
Cahan vs. Platt, 69 New York, 348.

In its amendment to the petition the plaintiff further alleged:

1. "And the plaintiff further avers that during the month of March, 1880, at Columbus, Ohio, the said iron rails described in the said contract of the weight of 50 lbs. per yard were fairly worth and of the market value of $70.00 per ton gross."

This part of the amendment was unnecessary. The facts alleged are implied from the averments in the original petition, and might be proven under such averments. The allegations were clearly redundant.

2. The plaintiff in its averment further says: "but on the contrary thereof on the 19th day of January, 1880, notified the said plaintiff that it repudiated the said contract and refused to execute and perform the same or to be bound thereby, and did in fact thenceforth wholly neglect and refuse to recognize or to execute and perform the same. Whereupon the said plaintiff notified the said defendant that it would go into the open market and purchase such iron rails on the best terms obtainable and hold the said defendant responsible for all damages resulting therefrom, the purchase of said iron rails being then necessary for the uses and purposes of the plaintiff in the construction of its railroad then in process of construction, and for which uses and purposes the said contract with the defendant was made as was well known to said defendant when said contract was made and when the same was repudiated as aforesaid. And the plaintiff says that by reason of said refusal of said defendant to recognize and execute said contract the said plaintiff was compelled to and did on the 26th day of January, 1880, purchase for the uses and purposes aforesaid 1,000 tons of such iron rails at and for the price of $70.00 per ton gross, that being the fair market price and the best terms obtainable in the market at that time."

These allegations were immaterial:

A. As to the allegation that on Jan. 19, 1880, the defendant repudiated the contract and declared its intention to not perform. If this would have entitled the plaintiff, at its option, to have commenced an action for a breach of contract before the time for performance, still it would not have changed the measure of damages.

"The plaintiff bought of the defendant 500 tons of iron, to be delivered in about equal proportions in September, October and November, 1871. In August, 1871, the defendant gave

notice to the plaintiff that he did not intend to deliver any iron. In December, the plaintiff commenced an action for non-delivery, and claimed as damages the difference on the 30th of November between the contract and market prices of the iron :

Held, that the proper measures of damages was the sum of the differences between the contract and market prices of one-third of 500 tons on the 30th of September, the 31st of October and the 30th of November, respectively."

Brown vs. Muller, (Law Reports, 7 Exchequer, 319) 3 Eng. Rep., 429.

"The defendant in April agreed to sell and the plaintiffs to buy 3,000 tons of coal at 8s. 6d. per ton, 'to be taken during the months of May, June, July, and August.' No coal having been taken by the plaintiffs in May, the defendant wrote on the 31st of that month desiring the plaintiffs to consider the contract cancelled. The plaintiffs did not assent to this; but on the 11th of June the defendant definitively refused to deliver any coal, and on the 3d of July the plaintiffs brought an action for this breach.

"At the trial, which took place on the 13th of August, the plaintiffs proved that the price of coal had risen during the whole period since the beginning of May, and was still rising. No evidence was given to show whether the plaintiffs could have gone into the market and obtained a new contract for coal.

"*Held*, that in the absence of evidence on the part of the defendant that the plaintiffs could have obtained a new contract on such terms as to mitigate their loss, the true measure of damages was the sum of the differences between the contract price and the market price *at the several periods for delivery*,

notwithstanding that the last period had not elapsed when the action was brought, or when the cause was tried."

Roper and Another vs. Johnson, [Law Reports, 8 Com. Pleas, 167] 4 Eng. Rep., 397.

B. The allegation of a notification to the defendant that the plaintiff would go into the open market and purchase the rails or of the fact of such purchase was clearly irrelevant. The measure of damage surely cannot depend upon the option or action of the plaintiff. There is some fixed rule by which they are to be established. This rule cannot depend upon the caprice or judgment of the plaintiff.

C. The allegation that the purchase of the iron rails was made for the uses and purposes of the plaintiff in the construction of its railroad then in process of construction and that this fact was known to the defendant when the contract was made and when the defendant repudiated it, was also immaterial. It does not matter for what purpose the plaintiff bought. It could use the rails for any purpose it pleased. It was not bound to adhere to an intention as to the use it had or expressed at the time of purchase. It may be presumed that when a railroad company buys rails that it does so for use in the construction or repair of its road. It is in its business a consumer of rails. But how can that affect the measure of damages for a breach by the seller of a contract to deliver rails *in the absence of any express stipulation as to the amount of damages the seller shall pay for such breach?* Here the alleged contract was to deliver at such time in *March* as the *seller* might elect. The plaintiff says that on January 19, before that the defendant repudiated the contract and that the plaintiff on January 26th bought other rails at the price of $70 per ton. It is not alleged and it would be absurd to allege that rails bought for delivery

in March were understood to have been bought for use in the January preceding.

But however that may be, the uses or purposes for which the iron was bought is immaterial.

In the case of *Grand Tower Co. vs. Phillips*, 23 Wallace, 471, "it was provided by the agreement that Phillips and St. John should have the sale of all coal produced by said mines which should be sold at or below Cairo, and that they should not sell any coal north of Cairo." The use and purpose for which the coal was sold was its resale at or below Cairo on the river as was known and contemplated by both parties. Yet the court held that the measure of damages was the difference between the contract price and the value of coal at Grand Tower and not at or below Cairo."

See also *Prentice vs. Dike*, 6 Duer., 220.
Snell vs. Cottingham, 72 Ill., 162.
Horne vs. Midland Ry. Co., 7 Law Rep. (Com. Pleas) 583.
Fleming vs. Beck, 48 Penn. St., 309.

The amendment appears to proceed on the theory that the plaintiff had the right to demand and receive not only iron rails, but also a *recognition of the contract*, and to recover damages for a refusal of such recognition. If a complete contract was evidenced by the correspondence between the parties, any further recognition was unnecessary. How often may one party require that the other shall recognize a contract?

If the defendant repudiated the contract before the time for performance, then the plaintiff might rescind. But if the plaintiff did not choose to rescind, might not the defendant, when the time therefor arrived, perform? If the defendant remained bound to perform, why might it not yet do its duty? The plaintiff in its petition alleged that it "was *always* ready and

willing to accept the said iron rails, and to pay for the same *according to the terms of said agreement.*" These allegations remained in the petition as proposed to be amended. The plaintiff was therefore still ready to receive the rails in March. If then the defendant had delivered in March, and thus performed its contract, the plaintiff could not have recovered any damages because of its having bought other rails in January. If the defendant did not deliver in March, the damages to the plaintiff would still be those resulting from such non-delivery at that time.

This amendment alleged, "that by reason of said refusal of said defendant (on January 19, 1880), to recognize *and execute said contract*, the said plaintiff was compelled to, and did, on the 26th day of January, 1880, purchase" * * * 1,000 tons of such rails. As the contract was not to be performed until the following March, this must mean that, because of the refusal of defendant to *execute a written contract*, as required by plaintiff's telegram of Dec. 19th, the plaintiff bought other rails. It perfectly accords with our claim that the telegram of Dec. 19 was not intended to be, and is not to be construed to be an unconditional acceptance of the offer contained in defendant's letter of Dec. 8th. That telegram required a reply and the execution of a written contract before the parties should be mutually and reciprocally bound. It was a proposal to enter into such a contract. It was because the defendant would not recognize any obligation to accept such proposal, and to execute such written contract, that the plaintiff bought rails elsewhere, and sought to recover damages for a refusal to recognize such obligation and to execute a written contract. The original action was to recover damages for a non-delivery of rails. The amendment proposed to incorporate into it, an action to recover damages for

the non-recognition of an obligation or the non-execution of a written contract.

The English cases of *Frost vs. Knight*, Law Rep. (7 Ex.) 111, and *Hochster vs. De la Tour*, 2 E. & B., 678, relied upon by the plaintiff as deciding that a renunciation of a contract may give a present right of action before the performance is due by its terms, are not followed by all the American courts. They are repudiated by, and the contrary doctrine is held, in the case of *Daniels vs. Newton*, 114 Mass., 530, where the cases are reviewed and the question is fully considered. The above cited cases of *Brown vs. Muller* and of *Roper vs. Johnston* show that the English courts do not carry the doctrine so far as to permit it to affect the measure of damages for a breach of the contract.

Respectfully submitted,

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of Counsel.